Filed 2/7/19 P. v. Bradley CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALLEN BRADLEY, Defendant and Appellant.	C083288 (Super. Ct. No. 14F4107)

Defendant Michael Allen Bradley and several cohorts targeted two Hispanic men -- C. L. and M. S. -- to rob. Codefendant Kayla Tanner contacted each man on Facebook and lured them to a residence in Redding under the guise of a sexual encounter. Once there, the group robbed the men, taking their money and cars, and held them hostage while they used their debit cards to purchase merchandise.

All of the perpetrators entered plea agreements except defendant. A jury found him guilty of residential robbery in concert, kidnapping for purposes of robbery,

kidnapping for purposes of carjacking, carjacking, and false imprisonment by violence. Hate crime enhancements and personal use of a deadly weapon enhancements as to both victims were also found true, and defendant admitted having two prior strikes, two prior prison terms, and two prior serious felony convictions. After the court declined to strike one of defendant's strike priors, the court sentenced him to a total prison term of 79 years to life, plus 36 years in state prison.

On appeal, defendant contends that insufficient evidence supports the hate crime enhancements and the personal use of a deadly weapon enhancement based on a machete. He also argues that the trial court abused its discretion by failing to strike one of his strike priors and requests that we remand the matter for resentencing so the trial court may decide whether to exercise newly-granted discretion under Senate Bill No. 1393, which amends Penal Code sections 667 and 1385 to remove the prohibition on striking a serious prior felony enhancement.

We conclude sufficient evidence supports the hate crime and deadly weapon enhancements and that the trial court did not abuse its discretion by failing to strike one of his strike priors. We shall remand the matter for the trial court to determine whether to exercise its discretion to strike defendant's prior serious felony enhancements. We shall also order a correction of the minutes.

FACTS AND PROCEDURAL BACKGROUND

Defendant was charged jointly with Kayla Tanner, Tyler Woods, Zachary Parker, Krystal Kerby, and Lynette DeMello for the crimes in this case. Before trial, Tanner, Woods, Parker, Kerby and DeMello each pled guilty to various charges;[1] defendant rejected a plea offer and proceeded to trial. The evidence at trial showed the following.

---

[1] Tanner pled guilty to residential robbery in concert of M. S., second degree robbery of M. S., carjacking of C. L. and admitted a hate crime in concert allegation. Woods pled guilty to residential robbery in concert of M. S., residential robbery of C. L.,

A

The Robbery Of C. L.

In early July 2014, Tanner contacted C. L. through Facebook. On July 3, she texted him asking him to come over to her house because she was "Horney." He agreed. A few minutes later, Tanner sent a text to a friend stating, "I'm about to rob someone." When asked who, Tanner replied, "[a] Mexican . . . hahaha."

Almost immediately after C. L. arrived at Tanner's house, Woods appeared with a machete and demanded C. L.'s property, including his phone and nearly $800. C. L. complied. Woods and Tanner then took C. L. to his truck. While armed with the machete, Woods told C. L. that he would get hurt if he tried to escape. C. L. was scared.

Tanner drove the group in C. L.'s truck to a residence on Willis Street in Redding. Kerby, Woods's girlfriend, was at the house. After entering, C. L. told Tanner and Woods that he would not contact police if they released him, but they refused. Woods made a phone call, and defendant arrived at the Willis Street house approximately 20 minutes later. He was carrying a seven-inch knife in his hand. Woods asked defendant to watch C. L., and then Woods and Kerby left in C. L.'s truck. Woods left the machete on a table in the living room near C. L.

While they waited for Woods and Kerby to return, Tanner recorded a video of C. L. on her phone, which was played for the jury. On the video, defendant states, "[s]o this is the hostage." Tanner responded, "[i]t's kind of funny you can laugh." Defendant agreed that "it [wa]s funny." Later, defendant taunted C. L. that they could tie him up and put a bag over his head and torture him. Defendant grabbed the machete sheath and

---

kidnapping of C. L., and admitted a hate crime in concert allegation. Kerby pled guilty to residential robbery in concert of M. S. and admitted a hate crime in concert allegation. Parker admitted a residential robbery in concert of M. S. and admitted he personally used a deadly weapon during the offense. Freeman admitted a residential robbery in concert of M. S. and second degree robbery of M. S. DeMello admitted carjacking and kidnapping M. S.

asked Tanner, "where's that at?" Tanner responded, "right there," and defendant said "okay." Tanner then stated, "[h]e's like don't be afraid to use it . . . ." C. L. testified at trial that defendant actually picked up the machete while he was guarding him.

When Tanner told defendant that C. L. said he would call the cops, defendant warned him not to call the cops because "that would be a bad, bad thing." And when C. L. asked if he could watch cable television to pass the time, defendant responded, "Cable? [¶] To tie you up with?" Tanner laughed.

While holding C. L. captive, Tanner asked C. L. about his ethnicity. She asked C. L. why he came to the United States and stated that he should not be in the country. Defendant was present at the time; he asked C. L. whether he belonged to a gang or a cartel. Based on the questions, C. L. felt fearful, as if his captors viewed him as "less than them . . . [l]ike [he was] under the[ir] level."

Six hours later, around 1:00 a.m., Woods and Kerby returned to the house with boxes of food and bags from Wal-Mart. Woods then told C. L. to take Tanner home. Tanner drove C. L.'s truck to an apartment complex and threw a rock through another car's windshield. The car's owner came outside and slashed C. L.'s tires. C. L. then got in the driver's seat and drove Tanner home.

After the crimes, defendant texted Tanner saying she was "sexy as fuck!!" They agreed to "kick it sometime."

C. L. never reported the incident to the police because he feared the group would come after him. The crimes were only discovered after police found the video of C. L. on Tanner's phone while investigating similar crimes the group committed against M. S. a few days later.

B

The Robbery Of M. S.

Tanner communicated with M. S. via Facebook in early July 2014. After exchanging a few messages, they began texting and agreed to meet at the house on Willis Street in Redding.

When he arrived on the evening of July 6, 2014, Tanner directed him to the bedroom. A short time later, several people barged into the room, including Freeman, Woods, Parker, and defendant. Kerby was also present. Freeman was holding a crowbar and Woods had a cattle prod. Tanner demanded that M. S. empty his pockets. They took his truck keys, two cell phones and nearly $3,000.

M. S. tried to run but was struck with the cattle prod multiple times near his head and neck. He almost passed out from the pain. Fearing for his life, M. S. decided to cooperate. Woods demanded the PIN number for M. S.'s debit card and threatened to stun him again if he refused. M. S. gave them his PIN number. Several of the group left in M. S.'s truck, and Parker and defendant took turns guarding M. S. in the bedroom while holding the cattle prod.

Approximately an hour later, the other members of the group returned in M. S.'s truck. They forced M. S. to his truck at knife-point and drove him to a nearby motel. Parker escorted M. S. inside a room with the cattle prod. Tanner, Freeman, and DeMello arrived a short time later. Tanner texted defendant she was at the motel and provided him with the room number. Shortly thereafter, defendant arrived at the motel.

At the motel, defendant looked through M. S.'s phone and talked to Tanner. Tanner began taunting M. S., asking if he was sad and still wanted to go out with her. She asked whether the cattle prod hurt, and M. S. replied that it did and that she should grab it and try it on herself. Defendant then threatened M. S. that he better show respect to Tanner or he was going to get hurt. Defendant then ordered M. S. in the closet.

Although M. S. repeatedly asked to be released, telling the group that they could keep his truck and his money, they refused. Defendant told him that he was "not going anywhere mother fucker until we take all of your money." According to M. S., "they were using like bad words to like Hispanics a few times. They say Mexican this-and-that." M. S. heard DeMello say that they should let him go because "the Mexican people are really attached to their family. If you do something to one, the whole family is going to be involved."

During this time, Woods and Kerby were driving M. S.'s truck to various stores, purchasing merchandise with his debit card. Tanner was annoyed that they were taking a long time. She called and texted Woods multiple times asking when they would return. Around 11:00 p.m., M. S.'s phone began receiving fraud alert messages. Tanner informed Woods and Kerby, and they returned to the motel around 1:00 a.m.

Defendant and Parker eventually left the motel room; Freeman had apparently left earlier to attend a concert. Woods and Tanner argued over whether to let M. S. go; Tanner wanted to keep him longer so they could get more money out of his bank account. Tanner, Woods, DeMello, and Kerby ultimately decided to release M. S. Woods drove the group in M. S.'s truck to an apartment complex where Woods and Kerby got out. Woods tried to hand the keys back to M. S., but Tanner grabbed them. Woods and Kerby left, and Tanner forced M. S. into the backseat of the truck. DeMello was also there. Tanner drove the truck to Wal-Mart in Anderson because DeMello wanted to purchase a cell phone with M. S.'s debit card. Along the way, Tanner stopped and picked up Freeman.

M. S. heard DeMello speaking on the phone, asking someone to come watch him so they could spend his money. She offered the person cash if he or she agreed, and said that if M. S. got aggressive to beat him up. Upon hearing this conversation, M. S. started to panic and wanted to get out of his truck. When they arrived at the Wal-Mart, DeMello went inside to purchase the phone. Freeman sat in the backseat with M. S. watching him

with a knife. When DeMello returned and opened the front passenger door, M. S. jumped out of the truck and Freeman tried to stab him. Defendant ran into the store, and the women fled in his truck. M. S. escaped around 2:00 a.m. on July 7, and immediately reported the crimes to the store manager who called police.

Later that morning, defendant texted Tanner, "[y]ou are sexy as fuck!!!!" Freeman texted Tanner that the police were at Wal-Mart. Tanner's cell phone call log shows multiple calls between she and defendant, and then defendant texted Tanner around 5:00 a.m., telling her to "[d]elete everything."

C

The Perpetrators Are Arrested

On July 8, 2014, police arrested Krystal Kerby and Tyler Woods. Tanner was arrested the next day. Police found M. S.'s phone in Tanner's house. A search of Tanner's cell phone uncovered the video Tanner made of C. L. while she and defendant held him hostage. The officer happened to recognize C. L. from a soccer league they played in together. Parker was arrested a few days later.

D

The Trial

Defendant was arrested and interviewed by police on July 17, 2014. During the video recorded interview, which was played for the jury, defendant admitted there was a "Mexican dude" at the Willis Street house when he arrived on July 3. He claimed that Woods called him and asked him to sit with Tanner and "her friend," but denied knowing C. L. was being held hostage. He denied picking up the machete. When confronted with the video Tanner made of C. L., defendant claimed he thought it was a joke and that they were just "fuckin around."

Defendant admitted returning to the Willis Street house a few days later when another Hispanic man (M. S.) was in the house because the group wanted drugs from him. He acknowledged being at the motel with Tanner and M. S., but denied ever telling

M. S. to get in the closet and said he never carried a knife, although he admitted having a couple of knives. He denied making white power statements, noting that some members of the group were Indian.

At trial, M. S. identified defendant as the bald headed, tattooed man involved even though he originally picked someone else out of a photographic lineup shortly after the crimes. C. L. also identified defendant at trial. Defendant did not testify or call any witnesses, but he did show the jury the tattoos on his legs.

The jury found defendant guilty of three offenses involving M. S., residential robbery in concert, kidnapping for purpose of robbery and kidnapping for purpose of carjacking, and found the personal use of a deadly weapon (the stun gun/cattle prod) and hate crime enhancements attached to those counts true. The jury found him not guilty of assaulting M. S. with a stun gun or Taser, and found him not guilty of the lesser included offense of misdemeanor assault for that count. The jury found defendant guilty of two offenses against C. L., carjacking and false imprisonment by violence, and found the hate crime and personal use of a deadly weapon (the machete) enhancements true. Defendant subsequently admitted the prior serious felony, prior strike, and prior prison term allegations.

Prior to sentencing, defendant requested that the court strike one of his strike priors under *Romero*.[2] The court denied the motion finding that defendant was not outside of the spirit of the three strikes scheme and that the interests of justice were served by sentencing defendant as a third striker.

---

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

DISCUSSION

I

Substantial Evidence Supports The Hate Crime Enhancements

Defendant contends insufficient evidence proved he committed hate crimes against M. S. and C. L. The evidence, according to him, at most shows that the victims were chosen for pragmatic reasons and not because they were Hispanic. The prosecution, in his view, failed to present sufficient evidence of bias motivation. We disagree with defendant's view of the evidence and conclude substantial evidence supports the hate crime enhancements found true by the jury.

When determining whether there is substantial evidence to support a conviction, we view the record in the light most favorable to the People, resolving all conflicts in the evidence and drawing all reasonable inferences in support of the conviction. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408; *People v. Small* (1988) 205 Cal.App.3d 319, 325 ["The substantial evidence rule is generous to the respondent on appeal"].) " 'We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented.' " (*Campbell*, at p. 408.)

Penal Code[3] section 422.55 defines a "[h]ate crime" as "a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: [¶] . . . [¶] (3) Nationality. [¶] (4) Race or ethnicity." (§ 422.55, subd. (a)(3)-(4).) Section 422.75, in turn, "increases the punishment for a felony *motivated* by prohibited bias." (*People v. Superior Court* (*Aishman*) (1995) 10 Cal.4th 735, 740.) Under section 422.75, subdivision (b) "any person who commits a felony that is a hate crime . . . and who voluntarily acts in concert with another person,

---

3 All further statutory references are to the Penal Code.

either personally or by aiding and abetting another person, shall receive an additional two, three, or four years in the state prison, at the court's discretion."

For purposes of the hate crime statutes, a defendant commits a felony " 'because of' " improper bias where "the bias motivation" is a "cause in fact of the offense." (*People v. Superior Court (Aishman), supra,* 10 Cal.4th at p. 741.) "[W]hen multiple concurrent causes exist, the bias motivation must have been a substantial factor in bringing about the offense." (*Ibid.*) A substantial factor is one that is not merely "theoretical" or "infinitesimal." (*In re M.S.* (1995) 10 Cal.4th 698, 719-720; *People v. Jennings* (2010) 50 Cal.4th 616, 643.) The Legislature clarified the causation definition in section 422.56, subdivision (d), which partly provides, " '[i]n whole or in part because of' means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic."

Viewing the evidence in the light most favorable to the judgment, we conclude that the jury reasonably could have found that defendant victimized C. L. and M. S. because of a bias against Hispanics or Mexicans. Before C. L. arrived, Tanner texted a friend that she was about to rob "[a] Mexican . . . .hahaha." When defendant arrived at the Willis Street house where Tanner was holding C. L. hostage, defendant stated, "[s]o this is the hostage." The jury could reasonably infer from defendant's statement that he was aware of and even encouraged Tanner's plan to target Mexican or Hispanic men to rob.

Tanner and defendant also made derogatory statements to C. L. while holding him captive. Tanner questioned why C. L. came to the United States and stated that he should not be in the country. Defendant was present at the time and did not voice any concerns or disagreement with her statements. Instead, defendant asked whether C. L. belonged to

a gang or a cartel. Based on the questions, C. L. felt fearful, as if his captors viewed him as "less than them . . . [l]ike [he was] under the[ir] level." From these circumstances, a reasonable jury could infer defendant and Tanner were biased against Hispanics and that their biases played more than a trivial role in the crime.

According to M. S., while defendant and his cohorts held him hostage at the motel, they used derogatory words toward Hispanics or Mexicans several times. Based on this testimony, the jury could reasonably infer defendant and the others degraded M. S. because he was Hispanic. Given that defendant and Tanner had committed a similar crime against C. L. only days earlier, the jury could reasonably determine that defendant's racial or ethnic bias played a substantial role in the crimes against M. S.

Tanner had also texted defendant before M. S. arrived for their supposed date. She told defendant: "You know [we're] on a mission today with the Mexican but after I will hit you up." Defendant responded, "Hit me up you know [I] do have a car." Defendant's response shows he never questioned or disagreed with Tanner, but implicitly acknowledged her plan to target a Mexican man and asked her to "[h]it [him] up."

Evidence also showed that Tanner targeted someone named "Lorenzo G." on Facebook. One of her text messages states that her "homeboy mikie said he's down;" she spoke with defendant shortly after the text. When Lorenzo G. got cold feet about meeting Tanner, she told a friend that the "fuckin beener think[s] I'm an under cover lol." From Tanner's racial slur, the timing of her phone call to defendant, and defendant's prior involvement in victimizing C. L. and M. S., the jury could reasonably infer "my homeboy mikie" was defendant and that he was considering helping Tanner rob another Hispanic man.

The fact that defendant may have partially been motivated to participate in the crimes against C. L. and M. S. because of a romantic interest in Tanner does not mean insufficient evidence supports the hate crime enhancements. Section 422.75 does not require that bias be the only or even the main factor in a crime. (§ 422.56, subd. (d).)

Instead, the bias motivation "must have been a substantial factor in bringing about the offense." (*People v. Superior Court* (*Aishman), supra,* 10 Cal.4th at p. 741.) From the evidence adduced at trial, the jury could reasonably conclude that bias against Hispanic or Mexican men was a substantial factor in targeting the victims of the crimes for which defendant was convicted.

The jury, moreover, was not required to believe defendant's claim during his police interview that he did not harbor racial animus toward the victims. (*People v. Manibusan* (2013) 5 Cal.4th 40, 87-88.) Given the guilty verdicts, the jury rejected defendant's statement as not credible. On appeal we do not reevaluate witness credibility. (*Id.* at p. 87.)

Defendant's attempt to frame the crimes as nothing more than criminal "pragmatism" because Hispanic victims were less likely to report crimes is not persuasive. He relies on an attorney general opinion which found that a hate crime is not committed if a defendant commits a crime wholly or partly because he perceives the victim's protected characteristic makes the victim more vulnerable to the crime unless the defendant also acts upon some animosity or other bias motivation toward that characteristic. (88 Ops.Cal.Atty.Gen. 141 (2005).) But the opinion itself recognizes that a perception of vulnerability can be grounded in bias, and that each case presents its own issues of proof. (*Id.* at pp. 147-148.) Here, the evidence *was* sufficient to show that defendant and his cohorts were motivated by bias against Hispanics given their derogatory statements and comments toward Hispanics or Mexicans. And, as the People argue, "[l]umping an entire race into one category (illegal immigrants) or believing an entire race is likely to act a certain way (not report crimes) and criminally acting on those beliefs is not pragmatic opportunism. Rather, it is the very discriminatory conduct that hate crime legislation is designed to punish."

II

Substantial Evidence Shows Defendant Personally Used The Machete Against C. L.

Defendant contends insufficient evidence shows he personally used the machete while holding C. L. hostage. We disagree.

Under section 12022, a defendant's sentence may be enhanced if he or she personally uses a deadly or dangerous weapon during a felony. (§ 12022, subd. (b).) There is no precise formula or particular fact pattern required to prove when a defendant uses a weapon for purposes of an enhancement. (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1002.)

To prove a defendant "used" a weapon, the evidence must show "something more than merely being armed." (*People v. Chambers* (1972) 7 Cal.3d 666, 672.) Intentionally displaying a weapon in a menacing manner qualifies. (*People v. Wims* (1995) 10 Cal.4th 293, 302.) When a defendant "deliberately shows" a weapon "or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure." (*People v. Granado* (1996) 49 Cal.App.4th 317, 325.) The "failure to actually point the [weapon], or to issue explicit threats of harm, does not entitle the defendant to a judicial exemption" from the enhancement. (*Ibid.*) Instead, the enhancement is inapplicable only if the evidence shows that the defendant's *conduct* with respect to the weapon was purely incidental to the crime. (*Ibid.*)

In this case, Woods originally used the machete to steal C. L.'s money and phone. He left the machete with Tanner while she held C. L. captive. When defendant arrived at the house, he referred to C. L. as the hostage and asked about the machete in front of him. Tanner told defendant that Woods said not to be afraid to use it while guarding C. L. During this exchange, defendant picked up the machete. He also taunted C. L. that they

could tie him up, put a bag over his head, and torture him. He threatened C. L. that it would be bad to call the police to report their crimes.

Based on this evidence, the jury could reasonably conclude that defendant used the machete within the meaning of section 12022. Defendant's conduct of intentionally picking up the machete and examining it in front of C. L. while he taunted him that he could torture him amply established that defendant's conduct toward the machete was more than an incidental exposure of the weapon. Instead, defendant actively displayed the weapon while making threats of torture in order to frighten C. L. into submission to effect his false imprisonment. Under these circumstances, the jury could reasonably conclude defendant displayed the machete in a menacing manner, which is sufficient to support the weapon enhancement.

People v. Hays (1983) 147 Cal.App.3d 534, which defendant cites for the proposition that passive display of a weapon is insufficient to prove an enhancement for personal use of a deadly weapon, is not to the contrary. In *Hays*, an employee felt threatened and afraid when the defendant crashed through the ceiling of her office, which contained the store's safes. (*Id.* at pp. 538-539.) The defendant had a rifle slung across his chest but he did not point the gun at her or otherwise threaten to use it. (*Ibid.*) The court found that the defendant's passive display of the rifle, without more, constituted arming but not use. (*Id.* at pp. 548-549.)

Here, by contrast, defendant displayed the weapon while talking about torturing C. L. Tanner also emphasized Woods's comment that they should not be afraid to use the machete on C. L. Defendant thus did more than merely passively display the weapon like the defendant in *Hays*. He coupled the display of the weapon with threats of torture, obviously meant to intimidate C. L. into not trying to escape while he and Tanner falsely imprisoned him.

III

Romero Motion

Defendant contends the trial court abused its discretion by failing to strike one of his prior serious or violent felony convictions pursuant to *Romero*. According to defendant, the court improperly disregarded the remoteness of his prior strikes, which both occurred on the same occasion, and failed to properly consider his youth when he committed the strikes as well as the nature of his other prior conviction, which he characterizes as a nonviolent drug offense. He also argues that he played only a minor role in the current offenses. The court did not abuse its discretion in denying defendant's request to strike one of his strike priors.

A trial court has discretion to strike a prior serious felony conviction only if the defendant falls outside the spirit of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) "[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In deciding whether to strike a prior conviction, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.)

The trial court's "failure to . . . strike a prior [felony] conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 374.) A trial court abuses its discretion when it refuses to strike a prior felony conviction only in limited circumstances, such as where the court

is unaware of its discretion to dismiss or considers impermissible factors in refusing to dismiss, or if the sentencing norm under the three strikes law leads, as a matter of law, to an arbitrary, capricious, or patently absurd result under the circumstances of the individual case. (*Id.* at p. 378.) It is not sufficient to show that reasonable people might disagree about whether to strike a prior conviction. (*Id*. at p. 377.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

In this case, the record reveals the trial court was well aware of its discretion to strike defendant's prior felony convictions and that it considered relevant factors in making its decision. The court considered defense counsel's arguments that his prior robbery convictions stemmed from a single incident involving two victims, that his prior criminal history did not include violent offenses, and that he only played a minor role in the current offenses. The court also reviewed the probation report, which detailed defendant's criminal history, including the age of his previous offenses, the length of time between convictions, and the seriousness of the offenses. The prosecution's sentencing memorandum, which the court also considered, argued that defendant's unbroken chain of criminality, which included two strikes for robbing two victims at gunpoint, his failure to take any responsibility for the current offenses, and his complete disregard for the law even after he received the benefit of another court granting a *Romero* motion in an earlier case showed that defendant was within the spirit of the three strikes law.

The court thus considered defendant's attitude toward his offenses, the nature and circumstances of his current crimes, defendant's age, criminal history and the age of his previous offenses, the length of time between convictions, his potential for rehabilitation, and the presence or absence of actual or threatened violence. These factors were appropriate. (*People v. Williams, supra,* 17 Cal.4th at p. 161.) After evaluating and weighing all the factors, the court found defendant was "not outside the spirit of the three

strikes scheme and that the interests of justice are served by this sentence." On this record, we cannot say the court abused its discretion.

Defendant's contention that the court should have viewed his two residential robbery convictions as one strike because they arose out of the same act is not persuasive. While his robbery convictions may have occurred on the same occasion, the offenses involved two separate victims. Thus, defendant's strikes differ from those in *People v. Vargas* (2014) 59 Cal.4th 635, 646-649, where the defendant was convicted for carjacking and robbery arising out of the single act of taking the lone victim's car by force. (*Id.* at pp. 637-639.) The *Vargas* court held that where a single act against a single victim yields multiple felony convictions only one of those convictions should be viewed as a strike for purposes of the three strikes law. (*Ibid.*) That rule does not apply here.

As the court in *People v. Rusconi* (2015) 236 Cal.App.4th 273, 281 explained, *Vargas* "does not extend to offenders . . . who have suffered multiple convictions growing out of a single act but who violently injure more than one victim." Because defendant robbed two separate victims at gunpoint in his prior offenses, *Vargas* does not compel a finding that the trial court erred by refusing to strike one of defendant's prior strikes. (*Rusconi*, at pp. 275, 280-281.)

Likewise, although time has passed between defendant's strike convictions in 1997 and his current convictions in 2014, that fact alone does not mean the court erred. Mere passage of time on the "Gregorian calendar" does not establish an abuse of discretion. (See, e.g., *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [age of 20-year-old conviction not determinative where defendant has not lead a " 'legally blameless life' " since his last strike conviction].) In 1997, defendant was sentenced to eight years in prison for the strike convictions. After being released, he was convicted of transportation of a controlled substance in 2005 and sentenced to eight years in prison after the court struck one of his prior strikes. He was released to postrelease community supervision in November 2011. Less than three years later, defendant committed the

current offenses. Because defendant has not led a "legally blameless life," we cannot say the court abused its discretion in refusing to strike one or both of defendant's prior strikes due to remoteness.

Nor does defendant's relative youth at the time of the strike offenses mean the court abused its discretion by denying defendant's *Romero* motion. Given defendant's nearly unbroken chain of criminality as he aged, the trial court could reasonably conclude the seriousness of defendant's offenses were increasing and not decreasing with the presumed maturity that accompanies aging. The court could also reasonably conclude that defendant's earlier strike convictions were not the product of youthful immaturity but rather his tendencies to commit violent crimes.

The record shows the court was aware of its discretion to strike and considered permissible factors in declining to do so. Defendant has failed to show that the court acted so irrationally or arbitrarily that no reasonable person could agree with its denial of *Romero* relief. His claim therefore fails.

IV

Prior Serious Felony Enhancements

Defendant contends recent legislative amendments in Senate Bill No. 1393 require remand for the court to consider whether to exercise newly-granted discretion to strike the prior serious felony enhancements imposed under section 667, subdivision (a)(1). The People concede the legislation applies retroactively to defendant and that remand is proper under the circumstances. We agree.

As previously noted, defendant's sentence in this case includes several five-year terms for prior serious felony enhancements under section 667, subdivision (a). When he was sentenced, the trial court had no power to strike the prior serious felony enhancements. (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045; see also, former § 667, subd. (a)(1) [prior serious felony enhancements shall be imposed "[i]n compliance with [former] subdivision (b) of Section 1385"] & former § 1385, subd. (b)

["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) Recent amendments in Senate Bill No. 1393 to section 667, subdivision (a) and section 1385, subdivision (b), which became effective January 1, 2019, now give trial courts the power to strike the five-year enhancement for a prior serious felony. (Stats. 2018, ch. 1013, §§ 1, 2 [deleting the prohibition against striking a prior serious felony enhancement]; Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

We agree the statutory amendments apply retroactively to defendant. "When a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature." (*People v. Francis* (1969) 71 Cal.2d 66, 75-76, citing *In re Estrada* (1965) 63 Cal.2d 740.) As the Supreme Court stated in *Estrada*, "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, at p. 745.)

Defendant should have an opportunity to argue to the trial court that it should exercise its informed discretion to strike the prior serious felony enhancements. We therefore remand for this purpose.

V

Correction To Clerk's Minutes

The People request that the clerk's minutes be corrected to accurately reflect the sentence the court orally pronounced on count 3 during the sentencing hearing. The court

imposed a term of 25 years to life in state prison, plus one year for the deadly weapon enhancement, four years for the hate crime enhancement, two years for the prior prison term enhancements, five years for one of the prior felony enhancements, and a stayed five-year term for the remaining prior felony enhancement. The clerk's minutes, however, indicate that the entire term on count 3 was stayed, not just the second five-year prior felony enhancement. Because the oral pronouncement of judgment controls, we shall direct the clerk to correct the minutes to accurately reflect the court's oral pronouncement of judgment. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

DISPOSITION

Defendant's convictions are affirmed. The matter is remanded for resentencing so that the trial court may consider whether to exercise its discretion to strike the section 667, subdivision (a) prior serious felony enhancements. The clerk is directed to correct the sentencing minutes to reflect the court's oral pronouncement of judgment on count 3.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.